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Case Note

Setting aside arbitral awards in Singapore: due process and good faith obligations

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KEY REFERENCES

- *China Machine New Energy Corp v Jaguar Energy Guatemala LLC and another* [2020] SGCA 12 (Singapore)
- *China Machine New Energy Corp v Jaguar Energy Guatemala LLC and another* [2018] SGHC 101 (Singapore)
- *Yam Seng Pte Ltd v International Trading Corporation Ltd* [2013] EWHC 111 (QB), [2013] 1 All ER 1321 (England)
- UNCITRAL Model Law on International Commercial Arbitration, Art 18
- UNCITRAL Model Law on International Commercial Arbitration, Art 34(2)(a)(ii)
- International Arbitration Act, s 24(b) (Chapter 143A) (Singapore)

ABSTRACT

The Singapore Court of Appeal in CMNC v Jaguar Energy *has offered clarification on what it identified as an 'important area of arbitration law': ie the correct approach to alleged violations of due process by tribunals in their management of the arbitral procedure. The case involved setting aside proceedings in the context of a complex dispute further complicated by the parties' prior agreement for an expedited procedure. The Court of Appeal judgment takes a robust approach towards alleged due process violations. It emphasizes that the matter must be assessed according to a test of reasonableness and fairness with careful*

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reference to the circumstances, and that courts should be cautious about interfering with a tribunal's decision-making where there is a rational basis for those decisions. But CMNC v Jaguar Energy *is notable for another reason: the presumption by the judge at first instance that there was implied into the arbitration agreement an obligation to arbitrate in good faith. That point may be of particular interest to those from common law jurisdictions where a more general debate over the role of good faith obligations in commercial contracts persists.*

1. INTRODUCTION

Arbitral tribunals have considerable discretion when it comes to procedural matters, including decisions relating to the disclosure of documents and the admissibility of evidence. In taking procedural decisions, there will be a number of relevant factors to consider as the tribunal attempts to balance the competing interests of the parties with the need to ensure an award can be rendered in an efficient and expeditious manner. But when might decisions by the tribunal violate due process and allow an award to be set aside or enforcement refused? That was the question considered by the Singapore Court of Appeal in *China Machine New Energy Corp v Jaguar Energy Guatemala LLC and another* (*CMNC v Jaguar Energy*).[1] The Court of Appeal's judgment makes it clear that the courts should be reluctant to interfere with the exercise of the tribunal's procedural discretion where there is a rational basis for the decisions it has reached. The dispute in *CMNC v Jaguar Energy* had been referred to arbitration following an acrimonious breakdown in the parties' commercial relationship. In the High Court (although not in the Court of Appeal), CMNC's attempt to have the award set aside was premised in part on its claim that Jaguar Energy breached its obligation to arbitrate in good faith and that the tribunal had failed to provide an adequate response to Jaguar Energy's conduct. The judge at first instance was prepared to proceed on the basis that the parties were indeed subject to a duty to conduct the arbitral proceedings in good faith.[2]

Having outlined the facts and then the High Court and Court of Appeal decisions, this piece will focus on two aspects of *CMNC v Jaguar Energy*. One concerns the 'ratio' of the Court of Appeal's decision: ie the principles to be applied when considering whether due process has or has not been followed. The other point is the *obiter* conclusion from the High Court that the parties were under an obligation to act in good faith. While that conclusion will be uncontroversial for civilian lawyers, it may attract the eye of lawyers in some common law jurisdictions (including Singapore and England) where there is an ongoing debate over the role of good faith in commercial contracts. Either way, the interesting questions are not so much about the existence of an obligation to arbitrate in good faith but its utility.

2. THE FACTS

The project giving rise to the parties' dispute involved CMNC constructing a power plant in Guatemala for Jaguar Energy. Two agreements were central to that

1 [2020] SGCA 12.
2 [2018] SGHC 101 [199].

arrangement. One was the Engineering, Procurement and Construction Contract (EPC Contract) executed in 2008; the other was the Deferred Payment Security Agreement (DPSA) executed in 2009. Each agreement was governed by New York law and provided for resolution of disputes by arbitration in Singapore under 1998 Rules of Arbitration of the International Chamber of Commerce. Of relevance to the events that unfolded was the stipulation in Clause 20.2 of the EPC Contract that the tribunal should render its award within 90 days of the third arbitrator having been appointed; a period that could be extended by a further 90 days. Clause 20.2 also stated that the tribunal 'shall endeavor to the extent possible to streamline the proceedings and minimize the time and cost of the proceedings'.[3] In 2013, when CMNC failed to meet certain deadlines under the EPC Contract, Jaguar Energy issued breach notices and reserved its right of termination. CMNC, in response, attempted to exercise rights under the DPSA. Jaguar Energy then purported to terminate the EPC Contract and also claimed the DPSA was terminated as a result. Jaguar Energy prevented access of CMNC's employees to the construction site; a Guatemalan court order subsequently led to the eviction of CMNC employees from the adjacent living quarters. As a result, CMNC no longer had access to a range of documents that had been available in the site office. Jaguar Energy also terminated CMNC's access to an online document platform. It was, moreover, alleged that Jaguar Energy seized two computers containing relevant documents. In 2014 Jaguar Energy commenced arbitral proceedings against CMNC, with Jaguar Energy claiming damages in compensation for its costs in completing the project. The tribunal awarded Jaguar Energy the vast majority of what it had claimed, with CMNC's subsequent attempt to set aside the award largely focussed on allegations that it had been unable to mount an appropriate response to Jaguar Energy's claim. It is also worth noting that parties agreed to extend the timeline for the arbitration beyond what had been originally agreed in Clause 20.2.

3. THE HIGH COURT DECISION

In setting aside proceedings in the Singapore High Court, CMNC cited three of the grounds contained in Article 34 of the UNCITRAL Model Law on International Commercial Arbitration (Model Law) and also section 24 of Singapore's International Arbitration Act (award induced or affected by fraud or corruption; breach of natural justice). The 'Due Process Ground' relying on Article 34(2)(a)(ii) and section 24(b) concerned CMNC's allegation that an attorney eyes only regime (AEO Regime) prevented CMNC from presenting its case properly and also that the tribunal did not consider CMNC's arguments relating to the DPSA.[4] The 'Defective Arbitral Procedure Ground' relying on Article 34(2)(a)(iv) involved two allegations: the tribunal breached Article 18 (equal treatment of parties) of the Model Law; and the tribunal did not respond appropriately to the breach by Jaguar Energy of its obligation to arbitrate in good faith.[5] The 'Public Policy and

3 ibid [7].
4 ibid [112]–[178].
5 ibid [179]–[214].

Corruption Ground' relying on Article 34(2)(b)(ii) and section 24(a) involved two complaints: one, that Jaguar Energy had used guerrilla tactics; the other, that tribunal had failed to investigate allegations of corruption and/or the award itself was affected by corruption.[6] Kannan Ramesh J rejected CMNC's case in relation to each of those three grounds and declined to set aside the award.

The High Court judgment is a relatively long one running to 232 paragraphs, but in the context of this case note it is worth drawing attention to two things. The first is the AEO Regime which the tribunal had imposed in relation to certain documents to be disclosed by Jaguar Energy. That order allowed the documents in question to be viewed only by CMNC's counsel and, with permission of the tribunal, named employees of CMNC for the purposes of giving instructions.[7] The court held that that the tribunal was empowered to make such an order under the applicable arbitration rules, albeit that it would have had those powers under Article 19(2) of the Model Law.[8] CMNC's point was 'not that the Tribunal had no power to grant an AEO order, but that the order was made in an inappropriate and indiscriminate way'.[9] Although a common feature of litigation in the USA, the judge observed that an AEO order was a procedural device 'rare in international arbitration but . . . not unheard of'.[10]

The second concerns the purported obligation to arbitrate in good faith. In the High Court, CMNC had submitted that 'the parties to an arbitration agreement both bear an implied duty to arbitrate in good faith . . . [and that the] duty forms part of the agreed arbitral procedure between the parties'.[11] It was further submitted that 'Jaguar employed guerrilla tactics in the Arbitration that amount to a breach of its duty to arbitrate in good faith and accordingly, a breach of the agreed arbitral procedure'.[12] CMNC claimed that in failing 'to restrain Jaguar's bad faith conduct . . . the Tribunal acted in breach of agreed arbitral procedure'.[13] Four aspects of Jaguar Energy's conduct were offered in support of CMNC's contention that the good faith obligation had been breached. (i) Seizing the physical location where the power plant was being constructed and terminating CMNC's access to the online document platform.[14] (ii) Seizing documents by evicting CMNC's employees.[15] (iii) Harassment of and interference with witnesses prior to the arbitration.[16] (iv) Disclosing documents in a disordered/delayed manner.[17] Kannan Ramesh J, who was willing to proceed on the basis that the parties were subject to a good faith obligation in relation to the conduct of the arbitral proceedings, nevertheless rejected

6 ibid [215]–[230].
7 ibid [56].
8 ibid [133]. The applicable provision was Art 20(7) of the 1998 ICC Rules: '[the] Arbitral Tribunal may take measures for protecting trade secrets and confidential information.'
9 ibid [133].
10 ibid [130].
11 ibid [192(a)].
12 ibid [192(b)].
13 ibid.
14 ibid [192(b)(i)].
15 ibid [192(b)(ii)].
16 ibid [192(b)(iii)].
17 ibid [192(b)(iv)].

CMNC's claim that Jaguar Energy's conduct amounted to breach of the purported good faith obligation.[18]

4. THE COURT OF APPEAL DECISION

The Singapore Court of Appeal rejected the appeal by CMNC, although by that stage CMNC's case was focussed solely on the 'Due Process Ground'. In the words of Sundaresh Menon CJ, giving the judgment of the court:

> The parties' right to be heard finds expression in Art 18 of the Model Law, which provides: The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case. This basic procedural guarantee finds teeth in Art 34(2)(a)(ii) of the Model Law and s 24(b) of the IAA, which provide, respectively, that the supervisory court may annul an award if the party against whom the award is invoked was 'unable to present his case', or where that party's rights are prejudiced because a 'breach of the rules of natural justice occurred in connection with the making of the award'. These provisions permit, in certain circumstances, the setting aside of an award where the procedural protections in Art 18 of the Model Law have not been duly accorded to the award-debtor.[19]

The focus of the appeal was, therefore, the conduct of the tribunal and its decision-making in relation to CMNC's access to documents.[20] Having examined in detail the tribunal's exercise of its discretion in the particular circumstances of the dispute, the Court of Appeal rejected CMNC's various complaints individually and also cumulatively as a basis on which the award should be set aside.[21]

There are several principles central to the court's analysis in deciding whether the party in question was denied the opportunity to present its case. First, the phrase 'full opportunity' in Article 18 ML does not mean an 'unlimited' opportunity, but rather that opportunity 'is impliedly limited by considerations of reasonableness and fairness'.[22] Second, an assessment of whether that 'full opportunity' was denied 'can only be meaningfully answered within the specific context of the particular facts and circumstances of each case'.[23] Third, that assessment relies on a test of reasonableness. The court must consider 'what the tribunal did (or decided not to do) falls within the range of what a reasonable and fair-minded tribunal in those circumstances might have done'.[24] Fourth, the question of reasonableness and fairness is not to be assessed in retrospect, but rather 'the tribunal's decisions can only be assessed by reference to what was known to the tribunal at the time'.[25] Fifth, one can note that

18 ibid [205]–[214].
19 *CMNC v Jaguar Energy* (n 2) [88]–[89].
20 ibid [105].
21 ibid [106]–[172].
22 ibid [104(b)].
23 ibid [104(c)].
24 ibid [104(c)].
25 ibid [104(d)].

'the court will accord a margin of deference to the tribunal in matters of procedure and will not intervene simply because it might have done things differently'.[26]

An examination of the way the Court of Appeal applied those principles to each of the various complaints made by CMNC is unnecessary here. However, the analysis of the tribunal's conduct in relation to the disclosure of certain sensitive documents is illustrative. The AEO Regime was put in place by the tribunal due to concerns expressed by Jaguar Energy that information in certain documents would enable CMNC to interfere with completion of the construction project. That AEO Regime was then replaced by an order allowing documents to be disclosed to CMNC's employees in a redacted form, before being partially reinstated. It was eventually lifted in its entirety. It was claimed by CMNC that 'the Tribunal's management of the disclosure process for sensitive documents was unfair, and amounted to a breach of natural justice'[27] and that CMNC 'suffered prejudice in that its ability to prepare its [case] was severely hindered'.[28] The central issue was identified by the Court of Appeal as follows:

> The question is not whether the AEO Order had adversely impacted CMNC's preparation of its case – it almost certainly did, to some extent. The question is whether the balance struck by the Tribunal in making the AEO Order as a whole – between Jaguar's interest in safeguarding the confidentiality of the documents in order to prevent harm, and CMNC's interest in being able to prepare its case unhindered in any way – is one which was so unfair or unreasonable as to fall outside the range of what a reasonable and fair-minded tribunal might have done in the circumstances.[29]

CMNC was unable to demonstrate that 'the restrictions on document production imposed as a result of the AEO Regime (and its successors) had any direct impact on CMNC's preparations in the critical period leading to the submission of [an expert report] and the other quantum evidence'.[30]

5. DUE PROCESS AND EQUAL TREATMENT

Underpinning the Court of Appeal's judgment is the aim of limiting 'the opportunity for those attempting to abuse the doctrine of due process'.[31] Abuse of due process, it is said, 'undermines and cheapens the real importance of due process in international arbitration' and 'can erode the legitimacy of arbitration as a whole and its critical role as a mode of binding dispute resolution'.[32] The decision by the Singapore Court of Appeal does not break new ground in the sense that it brings about a shift in the

26 ibid [104(d)].
27 ibid [108(a)].
28 ibid [108(b)].
29 ibid [112].
30 ibid [121].
31 ibid [4].
32 ibid [3]. This paragraph of the judgment includes a reference to Lucy Reed, 'Ab(use) of Due Process: Sword vs Shield' (2017) 33 Arb Int 361, 376.

principles to be applied when considering whether a party has been denied an appropriate opportunity to present its case or prejudiced by some other breach of natural justice. The Court of Appeal, for example, stated that the principles applicable to a breach of natural justice 'are well-established'.[33] And it is clear from the judgment that the relevant principles find support in pre-existing authorities from Singapore and England, the views of prominent commentators, and also *travaux préparatoires* of the Model Law.[34] That said, a key responsibility of appeal courts is their role in 'setting the tone for lower court decisions'.[35] The Court of Appeal's judgment is certainly clear in 'setting the tone' by emphasizing that courts in Singapore will be slow to interfere with a tribunal's discretion to manage the arbitral process. In this regard, one can note the way the judgment cites with approval (at [103]) formulae from previous authorities in Singapore ('either irrationally or capriciously')[36] and England ('so far removed from what could reasonably be expected of the arbitral process that it must be rectified').[37] It has, moreover, been stated explicitly that a court should exercise restraint even if it might have reached a different decision on the same set of facts.[38] Given the incommensurability of the various factors that will inform a tribunal's reasoning on procedural matters, there will in many cases be no single, right answer. If, for example, an arbitral tribunal concludes there is good reason for ordering disclosure of certain documents without any restrictions, that does not 'necessarily' mean that a differently constituted tribunal would act unreasonably in ordering disclosure of the same documents on an AEO-basis. The important point, it seems, is that there must be some rational basis for the decision reached: ie the tribunal must consider relevant factors of which it is aware and reach a decision giving proper weight to those factors in a way that is fair to each party. It remains to be seen whether AEO orders will become a more common feature of international commercial arbitration. A former president of the ICC Court of International Arbitration (as expert for CMNC) stated that while such orders are 'not yet commonplace in ICC arbitration, they are not unknown'.[39] With obvious links to confidentiality and interim measures, *CMNC v Jaguar Energy* suggests that an AEO order can, where appropriate, provide an effective means of dealing with disclosure and evidence in a way that protects a party's commercial interests.

CMNC v Jaguar Energy also suggests that care is needed in the use of expedited or fast track procedures. That parties are able to agree to an expedited procedure reflects the importance of party autonomy and the flexibility of arbitration as a means of dispute resolution. But having done so, an expedited procedure will then become the lens through which equal treatment and the 'full opportunity' to present one's case is viewed. Although the parties in *CMNC v Jaguar Energy* subsequently agreed

33 ibid [86].

34 ibid [86]–[104].

35 Ken Oliphant, 'Against Certainty in Tort Law' in Stephen GA Pitel, Jason W Neyers and Erika Chamberlain (eds), *Tort Law: Challenging Orthodoxy* (Hart 2013) 18.

36 *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] SGCA 28, [2007] 3 SLR(R) 86 [65(d)] (VK Rajah JA).

37 *ASM Shipping Ltd of India v TTMI Ltd of England* [2005] EWHC 2238 (Comm), [2006] 2 All ER (Comm) 122 [38] (Morison J).

38 *CMNC v Jaguar Energy* (n 2) [104(d)].

39 *CMNC v Jaguar Energy* (n 3) [130].

to extend the deadlines beyond those originally set out in Clause 20.2 of the EPC Contract, this aspect of the case indicates that an expedited procedure may be inappropriate where the dispute is a complex one raising a multitude of legal and/or evidential issues. When agreeing the content of an arbitration clause, the promise of a final resolution to a dispute within 3 or 6 months of the tribunal's appointment is attractive. But those shortened deadlines could prove a false economy in the long run, especially where truncated procedures give rise to complaints that due process was not followed and there is a subsequent attempt to set aside the award and/or resist enforcement.

6. AN OBLIGATION TO ARBITRATE IN GOOD FAITH?

There has been an ongoing debate in a number of common law jurisdictions in recent years over the role that good faith obligations should occupy in the context of commercial contracts.[40] In English law that debate has been heightened since the decision of Leggatt J (as he then was) in *Yam Seng Pte Ltd v International Trading Corporation Ltd.*[41] Much of the focus has been on so-called 'relational' contracts and the regulation long-term contractual relationships in the face of the indeterminacy of written agreements.[42] While a court will be likely to uphold express obligations to act in good faith,[43] the more pressing questions relate to the implication of good faith terms. When should such terms be implied? Do they undermine the certainty of written agreements? When is a contract a relational contract? Against that backdrop, several observations can be made in relation to the good faith aspect of the High Court judgment in *CMNC v Jaguar Energy*.

First, although the judge stated that he was prepared to 'proceed on the basis that Jaguar had an implied duty to arbitrate in good faith',[44] the relevance of good faith to arbitration agreements has not been settled conclusively in Singapore as a result of the case. The judgment offers a tentative conclusion rather than a statement of clear and settled law. The discussion of good faith obligations should, moreover, be treated as *obiter dicta* given that it was not essential for the decision.[45] It is also

40 See, for example: William M Dixon, 'Good Faith in Contractual Performance and Enforcement: Australian Doctrinal Hurdles' (2011) 39 Australian Bus L Rev 227; Daniele Bertolini, 'Decomposing Bhasin v Hrynew: Towards an Institutional Understanding of the General Organizing Principle of Good Faith in Contractual Performance' (2017) 67 UTLJ 348; Michael Bridge, 'Good faith, the Common Law and the CISG' (2017) 22 Unif L Rev 98; Severine Saintier, 'The Elusive Notion of Good Faith in the Performance of a Contract, Why Still a Bête Noire for the Civil and Common Law?' [2017] JBL 441. See also the various articles appearing in the first issue of the Journal of Commonwealth Law which are devoted to the subject of 'Good Faith in Contract': (2019) 1 J Commonwealth L, <https://www.journalofcommonwealthlaw.org> accessed 1 June 2020.

41 [2013] EWHC (QB) 111, [2013] 1 All ER 1321.

42 David Campbell, 'Good Faith and the Ubiquity of the "Relational" Contract' (2014) 77 MLR 475; Hugh Collins, 'Is a Relational Contract a Legal Concept?' in Simone Degeling, James Edelman and James Goudkamp (eds), *Contract in Commercial Law* (Lawbook Co 2016).

43 *HSBC Institutional Trust Services (Singapore) Ltd (trustee of Starhill Global Real Estate Investment Trust) v Toshin Development Singapore Pte Ltd* [2012] SGCA 48 [32]–[48] (VK Rajah JA) (Singapore); *Petromec Inc v Petroleo Brasileiro SA Petrobras (No 3)* [2005] EWCA Civ 891, [2006] 1 Lloyd's Rep 121 [115]–[121] (Longmore LJ) (England).

44 *CMNC v Jaguar Energy* (n 3) [196].

45 ibid [199].

apparent that the judge was exercising caution given that Singapore law (as does English law) rejects the idea of a general, overarching good faith obligation in relation to commercial contracts.[46] It is fair to say that in both Singapore and England the law is in a state of 'flux'[47] as regards the relationship between good faith and the implication of contractual terms.

Second, drawing on a passage from Born's *International Commercial Arbitration*, the judge indicates two potential sources for a good faith obligation in relation to an arbitration agreement. There is, first, 'the nature of an agreement to arbitrate ('the specific ground')' and, then, 'the general duty to perform contractual duties in good faith based on the doctrine of pacta sunt servanda ('the general ground')'.[48] The case leaves open, however, the relationship between the two grounds and whether, for example, the 'specific ground' is subsumed under the 'general ground'. That said, the context (including the case law referenced) suggests that, under Singapore law, the source of a good faith obligation to arbitrate in good faith would most likely be a term implied into the arbitration agreement *in fact* (rather than *in law*). In common law jurisdictions such as England and Singapore where there is no recognition of a general good faith obligation implied into contracts as a matter of law, much of the ongoing debate concerns the circumstances in which it would be appropriate to imply such a term in fact.

Third, the judge acknowledges one of the challenges of international commercial arbitration: the question of governing law, including the law governing the arbitration agreement. In particular, the fact that there could be different approaches to the implication of a good faith obligation depending on the law governing the arbitration agreement.[49] The judge avoids identifying the law governing the arbitration agreement in question and, instead, speaks in general terms: 'the answer will turn on the interpretation of the arbitration agreement under the governing law of the same, which will differ between arbitration agreements.'[50] It is not clear from the judgment whether the parties had expressly identified the law governing the arbitration agreement. It would appear not. In absence of an express choice by the parties, there is, however, reason to believe that New York law (rather than Singapore law) was the correct law against which an implied contractual obligation to act in good faith should have be judged.[51]

46 ibid [196].

47 *The One Suites Pte Ltd v Pacific Motor Credit (Pte) Ltd* [2015] SGCA 2 [44] (Andrew Phang Boon Leong JA) (Singapore).

48 *CMNC v Jaguar Energy* (n 3) [195].

49 ibid [196]–[197].

50 ibid [196].

51 See *CMNC v Jaguar Energy* (n 3) [7], [8] and [10] identifying Singapore as the seat and New York law as the law governing the matrix contracts. In the absence an express choice, the law governing an arbitration agreement would most likely be either the law governing the matrix contract (in this case, New York) or the law of the seat (in this case, Singapore). The Singapore case of *BCY v BCZ* [2016] SGHC 249, [2017] 3 SLR 357 suggests that, when looking at an implied choice of law to govern an arbitration agreement, the starting presumption is that the arbitration agreement will be governed by the same law chosen by the parties to govern their contract. In this regard, *BCY v BCZ* follows the approach adopted by the English Court of Appeal in *Sulamérica Cia Nacional de Seguros SA v Enesa Engenharia SA* [2012] EWCA Civ 638, [2013] 1 WLR 102. For further discussion see Hoi Seng Victor Leong and Jun Hong Tan, 'The Law Governing Arbitration Agreements: *BCY v BCZ* and Beyond' (2018) 30 SAcLJ 70. See

Fourth, there is reference by the judge to Article 2 A(1) of the Model Law which states that 'In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith'.[52] Although observing that provision has not been introduced in Singapore, the judge held that depending on the governing law a provision of such Article 2 A(1) 'may be relevant to whether the parties to an arbitration agreement bear a duty to arbitrate in good faith'.[53] The wording in Article 2 A(1) is, in substance, identical to an equivalent provision, Art 7(1), in the UN Convention on Contracts for the International Sale of Goods (the 'CISG') as well as a number of other UNCITRAL texts.[54] In each of those provisions, the text appears to be clear that the concept of good faith is relevant to the way the Model Law or CISG, for example, is interpreted, but without any indication that the reference to good faith is relevant to the implication of contractual terms requiring good faith standards. Several views have been expressed on the reference to good faith in Article 7(1) CISG.[55] On one view, Article 7(1) is simply an interpretative directive in relation to the CISG and cannot be used to impose good faith obligations on contracts.[56] On another, the reference to good faith can be used more expansively. It has been argued, however, that there is only a 'modest role' for good faith in relation to contracts governed by the CISG on account of the fact that the concept lacks content.[57] All in all, that points to a limited role for good faith where Article 2 A(1) has been adopted in the implementation of the Model Law. Before moving on, there is a final point to observe here. Even if the least persuasive interpretation of the Model Law Article 2 A were to prevail (ie the provision does impose on the parties an obligation to arbitrate in good faith), a good faith obligation would be imposed by the law of the seat rather than being a term implied in fact as part of the arbitration agreement (which seems to be the approach taken in *CMNC v Jaguar Energy*.) Moreover, were that unpersuasive interpretation of Article 2 A to be applied, there would be another question which might present itself: would the good faith obligation imposed on the parties as a result of Article 2 A take effect as an implied term within the arbitration agreement, or would it be a free-standing, 'non-contractual' statutory obligation?[58]

also *BNA v BNB and another* [2019] SGCA 84. In April 2020, however, the English Court of Appeal in *Enka Insaat Ve Sanayi AS v OOO 'Insurance Company Chubb'* [2020] EWCA Civ 574 departed from *Sulamérica* and held that, for an implied choice of law to govern an arbitration agreement, the starting presumption should be the law of the seat; it remains to be seen whether the Singapore courts will stick with the *Sulamérica* approach or opt for the contrary approach adopted in *Enka v Chubb*. The UK Supreme Court will hear an appeal in *Enka v Chubb* at the end of July 2020.

52 *CMNC v Jaguar Energy* (n 3) [198].

53 ibid [198].

54 Steven D Walt, 'The Modest Role of Good Faith in Uniform Sales Law' (2015) 33 BU Int'l LJ 37, 38–40.

55 Roy Goode, Herbert Kronke and Ewan McKendrick, *Transnational Commercial Law: Text, Cases and Materials* (2nd edn, OUP 2015) paras 8.38–8.49.

56 Eg in one arbitral award it was held that, in relation to a transaction governed by the CISG, there were no good faith obligations imposed on the parties, albeit that there may have been had the domestic law at the supplier's place of business (Germany) applied: ICC Arbitral Award 8611/1997, a summary of which can be found in Ingeborg Schwenzer, Christina Fountoulakis and Mariel Dimsey, *International Sales Law: A Guide to the CISG* (3rd edn, Hart 2019) 51.

57 Walt (n 54).

58 See the point made below in relation to the English Arbitration Act 1996, s 40.

Fifth, it appears the bar has been set high when it comes to the question of breach. The indication from *CMNC v Jaguar Energy* is that breach of the obligation to arbitrate in good faith would take into two account things.[59] The first is some element of intention: ie the party in breach of its good faith obligation would have acted with the clear intention of disrupting the proceedings. In other words, actions that we would be likely to label as bad faith conduct. Second, the relevant party's conduct would have a significant adverse impact on the arbitral proceedings: ie the conduct in question would have to be something that was far from trivial. If the approach taken to the breach question by the High Court in *CMNC v Jaguar Energy* is one that would apply across the board, it suggests that the situations in which a good faith obligation is breached will be limited. That conclusion also suggests that a good faith obligation in the arbitration context is likely to be narrow in scope.[60]

Finally, in contrast to the ongoing good faith debate in the context of commercial contracts, the key issue here is not so much the 'existence' of implied obligations to arbitrate in good faith but their 'utility'. For, even if one accepts that an arbitration agreement does contain an implied good faith obligation, what is its practical relevance? The question of good faith matters to commercial contracts given the close link to contractual remedies: ie breach of a good faith obligation (indeed, any contractual obligation) gives rise to a claim for damages and/or the right to terminate the agreement. But a claim for damages where an arbitration agreement has been breached, although available in principle, will play a minor or ancillary role at most.[61] Moreover, the right to terminate the arbitration agreement is unlikely to be of much interest to the non-breaching party; that party wants proper performance of the arbitration agreement not its termination. The precise scope of an obligation to arbitrate in good faith is open to debate,[62] and Kannan Ramesh J's presumption in *CMNC v Jaguar Energy* may well be the catalyst for argument around this point in future cases in Singapore. While that may be so, it is submitted here that what really matters in practical terms is not the existence and/or extent of good faith obligations in the context of an arbitration agreement, but rather the powers possessed by the tribunal to deal with bad faith conduct and a willingness to exercise those powers. It is instructive that the duty imposed on parties to an arbitration by the (English) Arbitration Act 1996 makes no mention of good faith: 'The parties shall do all things

59 See the analysis of the facts relevant to the good faith point: *CMNC v Jaguar Energy* (n 3) [205]–[213].

60 Although space precludes argument in relation to the point, it is suggested here that an arbitration agreement should *not* be regarded as a relational contract. For the contrary view, see Benedict Tompkins, 'The Duty to Participate in International Commercial Arbitration' [2015] Int ALR 14, 15 and 20.

61 For a discussion of damages for breach of an arbitration agreement in the English law context, see Julio Cesar Betancourt, 'Damages for Breach of an International Arbitration Agreement under English Arbitration Law' (2018) 34 Arb Int 511. Betancourt's article is focussed on breach of the negative aspect of arbitration agreements (ie commencing litigation in the face of an arbitration agreement) rather than the positive aspect (ie proper participation in the arbitral process).

62 Gary B Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International 2014) 1262: 'The precise contours of the obligation to participate cooperatively and in good faith in the arbitral process are unsettled.'

necessary for the proper and expeditious conduct of the arbitral proceedings.'[63] It has, moreover, be held that the duty does not take effect as an implied contractual term.[64] But more than that, the duty is linked to the default powers in section 41 that the tribunal can exercise where a party does not comply with its section 40 obligation. The powers that can be exercised by a tribunal in the face of bad faith conduct may be a more fruitful area of enquiry than debating what precisely it means for parties to act in good faith in the conduct of an arbitration.

7. CONCLUSION

The decision of the Court of Appeal in *CMNC v Jaguar Energy* confirms in unequivocal terms that the Singapore courts will be cautious about interfering with procedural decisions made by an arbitral tribunal acting within its discretion. While decisions concerning, for example, the disclosure of documents, the admissibility of evidence or procedural timelines can violate due process and prejudice a party's case, that is unlikely to be so where there is a rational basis for those decisions. The standard is that of the reasonable and fair-minded tribunal and a tribunal does not act unreasonably and unfairly merely because another tribunal (or, indeed, the judge viewing the matter from the perspective of setting aside or enforcement proceedings) might have reached a different conclusion on a procedural matter. And although the good faith point—is there implied into an arbitration agreement the obligation to act in good faith?—was not considered on appeal, questions remain over the practical significance of the High Court's *obiter* presumption. What is given with one hand in accepting the existence of such an obligation may be taken by the other in setting (what appears to be) a high threshold for breach. But not only that. Given the limited relevance of contractual remedies in this context, the more interesting questions, it would seem, are about the powers available to arbitrators to restrain bad faith conduct and how those powers are exercised.

63 Section 40(2) goes on to say that the s 40(1) duty 'includes—(a) complying without delay with any determination of the tribunal as to procedural or evidential matters, or with any order or directions of the tribunal, and (b) where appropriate, taking without delay any necessary steps to obtain a decision of the court on a preliminary question of jurisdiction or law . . .'.

64 *Elektrim SA v Vivendi Universal SA* [2007] EWHC 11 (Comm), [2007] 2 All ER (Comm) 365 [123]–[131] (Aikens J).